

Memorandum 75-62

Subject: Study 47 - Oral Modification of Contracts

You will recall that the Commission published a Recommendation and Study Relating to Oral Modification of Written Contracts and submitted two bills to the 1975 legislative session to effectuate the recommendation. One bill relating to Civil Code Section 1698 was held in the Assembly Judiciary Committee. The other bill relating to the Commercial Code was enacted as Chapter 7 of the Statutes of 1975.

The purpose of this memorandum is to present to the Commission various alternatives with respect to Civil Code Section 1698. A copy of the Commission's recommendation is attached. It is suggested that, at this point, you read pages 307-309 of the recommendation for background.

The Assembly Judiciary Committee disapproved of the bill dealing with Civil Code Section 1698 for various reasons. Several committee members voted in favor of the bill. The chairman of the committee took the view that the section should merely be repealed and not replaced by another statutory provision. The State Bar objected to the proposal, and this influenced some members of the committee. The basis of the State Bar opposition was that the proposed section set out on page 311 of the recommendation was too restrictive. Subdivision (c) of the proposed section on page 311 permits modification "to the extent that the oral agreement is executed." This codifies case law. However, the State Bar position was that it is likely that the California Supreme Court will go further and uphold all of an oral modification where there is merely part performance on the part of the party seeking enforcement. Other committee members took the view that the matter should be left to case law development rather than revising the statutory provisions to codify what the Commission believes is the substance of existing case law.

The Commission should consider the following alternatives:

(1) Drop this topic from its agenda without any additional recommendations being submitted. The staff believes this is undesirable. The existing statute does not state the law. The case law is confused and difficult to determine.

(2) Adopt the substance of the Commercial Code rule that permits oral modification unless the contract itself contains a provision that modification must be in writing and requires a separate signing of such a provision and compliance with the requirements of the statute of frauds if the contract as modified is within its provisions. See footnote 11 on page 309 of the text of the Uniform Commercial Code section.

(3) Adopt the rule that a contract in writing may be modified by an oral agreement supported by new consideration but the requirements of the statute of frauds must be satisfied if the contract as modified is within its provisions. This rule could be substituted for subdivision (c) of the section set out on page 311 of the recommendation. This is the choice preferred by the staff. However, a good case can be made for also including the substance of the Commercial Code provision that permits the parties to insert a requirement in the original contract that any modification be in writing.

We believe that it will be possible to draft a recommendation on this matter for the November meeting if the Commission determines that a new recommendation is to be submitted. We could then submit our recommendation to the 1976 legislative session.

Respectfully submitted,

John H. DeMouilly
Executive Secretary